No. 20552

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ISLAND AIRLINES, INCORPORATED, Petitioner, vs. CIVIL AERONAUTICS BOARD, Respondent.	PETITION TO REVIEW ORDER OF THE CIVIL AERONAUTICS BOARD

BRIEF FOR ALOHA AIRLINES, INC., AMICUS CURIAE

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INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

Aloha Airlines, Inc. (herein "ALOHA") is a Hawaii corporation holding a Certificate of Public Convenience and Necessity (issued to it after proof of public convenience and necessity in 1948) by Respondent (herein "CAB") under § 401 of the Federal Aviation Act of 1958 (72 Stat. 731, 49 U.S.C. 1301 et seq.). Aloha intervened in the applications before the Public Utilities Commission of the State of Hawaii (herein "PUC"), reviewed in In re Island Airlines, Inc., 44 Haw. 634, 361 P.2d 390 (1961); In re Island Airlines, Inc., 47 Haw. 1 and 47 Haw. 87, 384 P.2d 536 (1963); it intervened, filed a brief and presented oral argument in Island Airlines, Inc. v.

CAB, 352 F.2d 735 (9th Cir. 1965), which affirmed the injunction issued at the suit of CAB by the United States District Court for Hawaii (235 F.Supp. 990 (D.Haw. 1964)).

This brief as amicus is filed pursuant to Order of the Court granting leave on February 9, 1966.

Aloha views the application for blanket exemption as an attempt in effect by Petitioner to require CAB to decertificate Aloha on an unsupported showing that this is required by "deference" toward state sovereignty where Federal jurisdiction rests on a "purely technical" basis (R. 20-24) and on a claim that there can be no Federal interest "in protecting the two existing air carriers from competition." The analytical brief filed for CAB (in which brief Aloha joins) answers the substantive contentions made in the petition and demonstrated fully that there was no irregularity in the CAB's procedures.

Aloha will limit itself herein to a showing that: (1) within the existing Hawaiian regulatory framework covering public utilities, to surrender (by exemption) the jurisdiction to license and regulate inter-island air transportation to the State of Hawaii, would on the record before this Court be, in effect, a revocation of Aloha's certificate and such revocation is permitted by Federal law only for intentional violations of the Act (Section 401(g), 49 U.S.C. 1371(g)), and (2) the exemption, if granted, would in effect be placing Aloha's business in a regulatory void and would cripple the existing certificated carriers and destroy for the interstate passengers as well as

intrastate passengers the existing air service all without a record showing of "any facts which would indicate that existing services are inadequate to meet the air service needs of Hawaiian residents" (R. 168).

STATUTES INVOLVED

Relative provisions of the Federal Aviation Act of 1958 (72 Stat. 731, as amended, 49 U.S.C. 1301, et seq.,) are reproduced in the brief for CAB. In addition, reference is made herein to Section 401(g) which reads as follows:

TITLE IV - AIR CARRIER ECONOMIC REGULATION

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

* * * *

Alteration, amendment, modification, suspension, or revocation

Sec. 401. [72 Stat. 754, 49 U.S.C. 1371]

"(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this subchapter or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: Provided, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in

ment, modification, suspension, or revocation of the certificate."

I

THE BLANKET EXEMPTION WOULD AMOUNT TO A DECERTIFICATION OF ALOHA CONTRARY TO SECTION 401(g) OF THE FEDERAL AVIATION ACT OF 1958 (49 U.S.C. 1371(g)).

The Petitioner has heretofore unsuccessfully urged upon this Court its view that Federal agencies and the Court should refrain from exercising their Congressionally granted powers and duties because of the Hawaiian Supreme Court's decision upholding the PUC's jurisdiction over air transportation between the islands. The present position of the Petitioner can be paraphrased by the conclusion contained in the brief of State of Hawaii, Amicus Curiae:

> "However competent and well-meaning a Federal agency such as the Civil Aeronautics Board may be, it cannot be denied that a State agency acutely sensitive, aware and attuned to ever changing local needs and conditions can provide more effective and meaningful controls and regulations for Hawaii's air-transportation problems." (State Br. p. 5)

Assuming, arguenda, there could be a factual basis for the political argument contained in the State's conclusion, we submit to this Court that Aloha with its huge investment in providing a public service, cannot legally be decertificated upon the basis of the political considerations contained in the State's brief. The State, through its elected representatives and through its governmental machinery, has a continuing opportunity to address the Congress of the United States. Before the law making body, Aloha believes it could be abundantly

demonstrated that the State's position is not supportable and a statutory change of responsibility would ultimately militate against the economic well-being of these islands. In this Court proceeding, however, we feel it our duty merely to call attention to the legal requirements that might impel a court to overturn the administrative determination made by CAB.

In determining whether this court should overturn the CAB's determination that Petitioner has "not shown that the enforcement of the provisions of Title IV of the Act is an undue burden upon Island by reason of the limited extent of or unusual circumstances affecting its operations, and would not be in the public interest" (R. 168 (finding of CAB)), the nature of Petitioner's operations in Hawaii as disclosed by the record are considered:

A. Island has not only denied consistently CAB jurisdiction and flown in violation of Federal law (which flaunting of the law resulted in the injunction affirmed by this Court (352 F.2d 735), but it has operated in violation of State law. [See the background of the operations set forth in Hawaiian's answers R. 40-43.]

B. The PUC in denying to Island an interim Order to permit it "to continue the intrastate transportation of passengers by air between the islands of the State of Hawaii" (R. 140) specifically found that all of Island's operations to this date as a carrier by air have been unauthorized under State law.

"The record is abundantly clear that the Commission, in approving Island Airlines' original application on July 26, 1962, did so on a schedule proposed by the Applicant for a six-island, three-plane operation and a capitalization authorized at $250,000. Applicant has indicated in this record that in beginning commercial operations about a month and a half ago, it did so on a one-plane, four-island basis, without prior approval of this Commission. While the Commission does understand and is sympathetic with Applicant's difficulties with the Civil Aeronautics Board, the Federal Aviation Agency and the Federal Government, it has never authorized Applicant's one-plane, four-island operation." (PUC: Decision & Order No. 1227, R. 140, 141)

CAB has cogently dealt with (CAB Br. pp. 23-34) Island's "constitutional policy arguments" and arguments that the public interest calls for preservation of local power over local commerce. CAB points out that the Board specifically dealt with this question [in this exemption proceeding], finding that it had been disposed of by Congress itself. (R. 168-169) We deal here with the Hawaiian regulatory statutes. The Hawaiian statutory scheme for regulation of public utilities has not been substantially altered since Congress dealt with it at the time of statehood. The Hawaiian Supreme Court has recognized (384 P.2d 536, 545) that under State law the PUC has a duty to compel compliance of locally operating utilities with Federal law.

"As amended Chapter 104, R.L.H. 1955, conferred upon the Commission inter alia the following powers:

'5. To "examine into the condition of each public utility, * * * its compliance with all applicable [State] and federal laws * * * and all matters of every nature affecting the relations and transactions between it

> and the public or persons or corporations." Sec. 104-6. To examine into such matters "notwithstanding that the same may be within the jurisdiction of the interstate commerce commission, or within the jurisdiction of any court or other body, and when after such examination the commission is of the opinion that the circumstances warrant, it shall effect the necessary relief or remedy by the institution and prosecution of appropriate proceedings or otherwise before the interstate commerce commission, or such court or other body, in its own name or in the name of the [State], or in the name or names of any complainant or complainants, as it may deem best." Sec. 104-14.'"

The Supreme Court also points out that State certificating procedure was not in effect,

> "But Federal certification procedure was in effect, and the record was such that under RLH §§ 104-6 and 104-14 as set forth in paragraph J, supra, the Commission had the power and the duty to examine into, and of necessary effect, compliance with the Federal law by all available means . . . we cannot agree that under our statute the Public Utilities Commission has no responsibility with respect to Compliance with Federal law. See Inter-Island Steam Nav. Co. v. Territory, 305 U.S. 306, 59 S.Ct. 202, 83 L.Ed. 189, aff'g 96 F.(2d) 412 (9th Cir.) which aff'd 33 Haw. 890; Territory v. Inter-Island Steam Nav. Co., 32 Haw. 127." 384 P.2d 536, 541.

It seems abundantly clear that under the existing statut local interests are fully protected by permitting and directing the State agency to be the watchdog over the now admittedly Federally regulated business in which Island seeks to engage. The State agency has full power "to effect compliance with Federal law by all available means." This State machinery (and all other legal machinery available to the State) has been completely ignored and the applicant asks this Court to help it by supplying a

"sledge hammer" exemption. What is needed is an orderly, factually supported application, by Island to CAB for a Federal certificate, something it has had ample time (but no inclination) to apply for.

As pointed out by CAB (Br. p. 20) Hawaiian and Aloha operate as part of the National air transportation system. The National system under Congressional regulation is adapted to the needs of the "'foreign and domestic commerce of the United States, of the Postal Service, and of the National defense.'" The development of such a National system has made it mandatory in most cases that local carriers be supported by subsidies and the Federal government has a substantial interest in the problems of inter-island air transportation because of subsidies paid since 1949. The State has not made, and in all probability could not, provide comparable subsidies to the end that (in the interest of all of the citizens of all of the United States) there be provided a service comparable in standard to that maintained by the inter-island certificated air carriers at the present time. To ignore the diversionary impact of competitive service on the established Federally certificated carriers is not only irresponsible public utility regulation, but flies in the face

of a National policy established by the Congress.[1/]

II

THERE IS NO STATE CERTIFICATING AUTHORITY UNDER EXISTING STATUTES.

The State of Hawaii, Amicus Curiae, urges that it not only has the jurisdiction but also the necessary laws and machinery to regulate properly the inter-island air transportation service in the State of Hawaii (State Br. Amicus Curiae, p. 2).

In 1962, the State legislature of Hawaii, in mistaken reliance upon the jurisdiction asserted by the State, has given the PUC the authority to control the entry of air carriers in Hawaii by the issuance of certificates of public convenience and necessity (Sec. 3, Act 25, Session Laws of Hawaii, Regular Session 1962) subject only to the proviso that the exercise of this certificating authority shall be ineffective until such time as there has been a final determination by the courts that the PUC does as a matter of law have jurisdiction over air

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1 The United States District Court ruled in favor of the CAB and issued a permanent injunction against Island on August 8, 1963. The supplemental opinion of the Hawaii Supreme Court had remanded Island's application to the PUC for further hearings and for findings on the effect of the operation upon the Federally certificated carriers. The months of hearings that are referred to in the State brief occurred in a period after a Federal court had determined that the PUC had no jurisdiction, the State taking the position that the supremacy clause of the Constitution was in no way applicable to an administrative proceeding.

transportation service.[1]

It is clear within the existing statutory framework of Act 25, supra, as expressly determined by the PUC[2] that it does not presently have certificate issuing authority. Consequently, statutes of Hawaii do not presently afford or even permit the proper regulation of the air transportation service within the State of Hawaii and the obvious outcome of the relinquishment in toto of regulation by the CAB would be a chaotic air transportation service unlimited in new entries.

The factual material contained in the State's brief (pages 4 and 5) demonstrates that the State presently does not have the necessary machinery to regulate inter-island air transportation if such air transportation is to conform to the standards which have been maintained under Federal regulation.

The PUC, as appointed by the State, is made up of commissioners who serve "efficiently on a part-time, staggered-term basis for nominal compensation." Their only experience with the economic regulation of air carriers is that reflected in the present record, and this indicates the regulatory void that would exist were the blanket exemption granted. Aloha has,

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1 This proviso provides in part as follows: "Section 3 of this Act shall take effect immediately upon the final determination by the courts that the Public Utilities Commission of the State of Hawaii has jurisdiction to regulate air carriers operating between the eight major islands of the State."

2 See PUC Decision and Order No. 1502, Docket No. 1463, filed April 13, 1965 (In the Matter of the Application of Island Airlines Inc. for Approval of Rates) (Referred to R:39).

over objections made to the jurisdiction of the PUC, been subjected to the months of prolonged PUC hearings referred to in the State Brief (State Br. p. 4). In these hearings, in great detail, statistical data with respect to inter-island traffic, operating costs, fares, service and estimates of the effect of third carrier competition were presented to the PUC pursuant to the 1963 remand order of the Hawaii Supreme Court in In re Island Airlines, Inc., supra. Even after the injunction had been granted by the United States District Court,[1/] the State insisted that PUC hearings nevertheless continue and these ultimately resulted in the determination by the PUC, embodied in Decision and Order No. 1502, February 1, 1965 (R. 39). This Order is paraphrased by the State in its brief as follows:

> "Decision and Order 1502 filed February 1, 1965, by the Hawaii Public Utilities Commission came after months of prolonged hearings, testimony and other evidence submitted by Island Airlines and the C.A.B. certified carriers--Hawaiian and Aloha Airlines. This authorization issued by the Commission on February 1, 1965, approving Island Airlines' proposed rates and charges authorized Island Airlines to operate on the proposed schedules and rates for a test period of one year beginning six months after the effective date of the order, or such extensions as the Commission might grant. . . ."

An appeal was taken by Aloha to the Supreme Court

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1 The catastrophic impact on the inter-island carriers is summarized in the answer filed before the CAB by Aloha (R. 148-158). The Deputy Attorney General for the State who signe the brief amicus acted in the same capacity as attorney for the PU

of Hawaii from this Order, and the State on October 29, 1965, filed its motion for an order dismissing the appeal on the ground that the order of the PUC was an "interim" not a "final" order and therefore could not be appealed from. After this Court filed its decision on October 29, 1965 affirming the injunction of the United States District Court, a motion was filed by Aloha on January 25, 1966 in the Supreme Court for an order to remand the PUC proceeding back to the Public Utilities Commission. This motion for remand was resisted by the State (who insisted that the appeal should be dismissed) and is still pending before the Supreme Court.

Section 401(g) of the Federal Aviation Act specifically provides in substance that the Board shall not revoke a certificate in whole or in part except for an intentional failure to comply with the laws or regulations thereunder or with an order specifically commanding obedience to a provision, order, rule, regulation, term, condition or limitation found by the Board to have been violated. In effect, this means that a revocation of the certificate cannot be effected without proof of a wilful violation, and in Pan Am. World Airways, Inc. v. Boyd, 207 F.Supp. 152 (D.C.D.C. 1962), it was held that the Board may not achieve by indirection that which it is powerless to accomplish directly; it may not avoid statutory restriction on its authority to revoke a certificate. Not only is there no basis for the granting of a statutory exemption, but for the CAB to abdicate its jurisdiction on the basis of the record before this Court in favor

of the State would be the equivalent of an indirect revocation of the certificate heretofore given to Aloha.

It is abundantly clear that there is at the present time no State certifying authority for air carriers engaged in inter-island air transportation and that the blanket exemption would therefore in effect amount to a decertification of Aloha in violation of the Federal statute.

CONCLUSION

Neither the Petitioner nor the State has presented to this Court a basis upon which the CAB could be asked to relinquish to the State its jurisdiction to regulate inter-island air transportation in Hawaii. A fortiori no record has been made out upon which this Court could make its determination that the CAB order is wrongful. The entry of a blanket exemption as prayed for by the petition would result in an indirect decertification of Aloha in violation of Federal law.

WHEREFORE, it is respectfully submitted that the Board's order should be affirmed.

Dated: Honolulu, Hawaii, April 12, 1966.

J. Russell Cades

J. Russell Cades

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